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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

HARLAN E. ORR, Petitioner

v.

THE ARGUS—PRESS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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James J. Kobza and William C. Marietti, counsel for Harlan E. Orr, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, pp.) is not reported at this time. The written opinion of the district court (App. C. infra, pp.) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, infra, pp.) was filed on October 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether First Amendment standards of evidence insulate respondent from an actual and punitive damage jury award.

STATEMENT

This is a diversity case, brought by petitioner while a resident of Wisconsin against a Michigan corporation doing business in Owosso, Michigan.

Petitioner, Harlan E. Orr, began practicing law in 1923 in Indiana, and retired in 1965. He began to develop small shopping centers, and started such a project in Owosso, Michigan in mid-1973.

He planned to solicit financing from local investors and secured legal assistance from an Owosso attorney. Five potential equity investors had paid in a total of $27,500 when Mr. Orr decided this course was not about to succeed. Through his attorney, all money paid in was returned in September, 1973.

On November 19, 1973, Mr. Orr was arrested on fifteen counts of alleged Michigan Securities Act violations.*

The respondent, Argus Press Company, assigned reporter Herbert Haase to cover the district court arraignment. His main source was a phone call to the court clerk. When his editor asked if he attended the arraignment, the reporter lied and said he had done so.

The editor told him to change the wording of the Associated Press wire story on the arrest. The reporter submitted an article which was printed in the November 20, 1973 edition of the Argus-Press, above its masthead. The story claimed that Mr. Orr had been charged with (34) "counts of

* Trial Exhibit 66. On August 21, 1974, all original charges were dismissed against both arrestees, with each entering a no contest plea to an added misdemeanor charge.

fraud, in connection with a *phony* shopping mall investment *scheme* that allegedly sought to take $250,000 from local investors . . ."; That Mr. Orr was implicated in an alleged "*swindle*" (underlined are libel charged); (App. A, infra pp.).

The indictment was carefully drawn, avoiding sections of the law proscribing "scheme to defraud" and "fraud or deceit". These words do not appear in the court record of indictment.*

Mr. Orr demanded a retraction, the respondent's attorney admitted the story should have been handled different than it was, drafted a retraction, but failed to have it printed. (R Ex 55, pp. ; R 464).

Shortly after the retraction demand was received, the reporter destroyed his notes on the story.

Mr. Orr's business and personal life was devasted by this erroneous report of the charges brought against him.

The jury returned a verdict for plaintiff Orr in the amount of $5,000 actual damages and punitive damages of $15,000 (App. A, infra pp.).

The trial court denied respondent's motion for judgment notwithstanding the verdict and for a new trial (App. C, infra pp.). The court explained its ruling by summarizing that the jury could believe from all testimony that the newspaper had injected speculation, rumor, and suspicion in order to spectacularize the account, and could conclude that respondent had a high degree of awareness that material it added to the AP release was in all probability false. The newspaper's witnesses lacked credibility. Reckless disregard for truth was a valid conclusion for the jury to reach (App C, infra, pp.).

* Trial Exhibit 66. On August 21, 1974, all original charges were dismissed against both arrestees, with each entering a no contest plea to an added misdemeanor charge.

The newspaper appealed, mainly claiming, as at post trial motion hearing, the evidence insufficient to support the punitive damage portion of the verdict. The court of appeals agreed, and, in addition, found Mr. Orr a "public figure" reversing the entire judgment (App A, infra, pp.).

REASONS FOR GRANTING THE PETITION

This case was tried under Michigan libel law and statutes, but throughout the trial both parties agreed the "reckless-disregard-for-truth" requirement of *Time Inc.* v *Sullivan*, 376 US 254, applied to the case; both to overcome Michigan's common law qualified privilege,* and to support punitive damages.

The trial court thought the evidence presented a jury question, the jury found such "reckless disregard", but the court of appeals disagreed and reversed.

A substantial question is involved in this case as the lower court's reversal appears in contradiction to this Court's rulings in *Butts* v *Curtis Publishing Co.*, 388 US 130, rehearing denied 389 US 889.

It is distinguishable from *Greenbelt Coop. Publ Asso.* v *Bresden*, 398 US 6, in that here the judge's instruction to the jury correctly stated the *Times* rule (R 1077), and the news report of Mr. Orr's arraignment proceedings was not an "accurate and truthful report" (id., p. 11).

It is also distinguishable from *Time Inc.* v *Pape*, 401 US 279 in that the court arraignment documents were never examined, and if they had, would have disclosed charges mainly of technical violations-failure to register securities.

Further, the appeal court's holding that Mr. Orr was a "public figure" appears contrary to this Court's rulings in

* *Lawrence* v *Fox*, 357 Mich 134, 97 NW 2d 719; the standard more recently affirmed in *Piesner* v *Detroit Free Press Inc.*, 82 Mich App 153, 266 NW 2d 693 (allowing case to trial).

Gertz v *Welch*, 418 US 323, and *Time Inc.* v *Firestone*, 424 US 448.

This case presents one facet which has not been previously before the Court. Do the actions of respondent's agents immediately following the publication furnish the better proof of its disregard for truth?

There are numerous federal and state court cases which have been dismissed by failing the "reckless disregard for truth" standard, and others with like facts which have succeeded to judgment. The Court may desire to review this standard, under the instant case situation, giving it either more or less substance for direction of the lower courts.

CONCLUSION

Consideration of this petition should be allowed.

Respectfully submitted:

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Attorneys

January, 1979

APPENDIX

APPENDIX A

UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 76-2206

HARLAN E. ORR,
Plaintiff-Appellee,

v.

THE ARGUS-PRESS COMPANY,
Defendant-Appellant.

ON APPEAL from The United States District Court for the Eastern District of Michigan.

Decided and Filed October 19, 1978.

Before: PHILLIPS, Chief Judge; CELEBREZZE and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. In this diversity case, following a jury trial in the United States District Court for the Eastern District of Michigan, appellant, the Argus-Press Company was found liable for $5,000 compensatory damages and $15,000 punitive damages for publishing an allegedly libelous article regarding the indictment and arrest of Harlan Orr, appellee, on charges of securities fraud. We conclude that "actual malice" is the standard to be applied in the present case, both under the "qualified privilege" developed at common law in the courts of Michigan and under the first amendment, as interpreted by the Supreme Court in *New York Times Co.* v *Sullivan*, 376 U.S. 254 (1964), and later cases. While the malice standards are somewhat different under Michigan law and under the first amendment, both of those standards protect the newspaper from liability in the

context of this case. We therefore vacate the judgment below and remand the case to the District Court to dismiss plaintiff's suit with prejudice.

I. STATEMENT OF THE CASE

A. Conduct of the Parties

Orr, a Wisconsin attorney and president of the J.M.H. Development Company, proposed to build a shopping mall in Owosso, Michigan. The venture was publicized in the local press, in part as a result of efforts by Orr and his associates to obtain publicity. To raise money, Orr prepared and distributed to local investors a prospectus describing the project. Orr was attempting to raise $250,000 through stock sales but, in fact, received only $27,500 from five local investors. The project fell through, and the investments were returned.

In November, 1973, Orr and a business associate were indicted in connection with the venture on a total of thirty-four charges of violations of the Michigan securities laws. Orr himself was charged with fifteen counts. Five counts charged the unlawful sale of unregistered stock; eight counts charged the unlawful failure to disclose information; two counts charged affirmative acts of deceit, alleging that Orr had told two potential investors that J. C. Penney Company, a large department store, had already leased space in the proposed mall when, in fact, the company had not done so.

After Orr's indictment and arrest, the Argus-Press published the following story. We italizize the words which Orr contends are libelous:

> "Two Charged in Shopping Mall *Fraud*":
>
> A former Owosso man and his business partner have been charged with a total of *34 counts of fraud* in connection with a *phony shopping* mall investment *scheme that allegedly sought to take* $250,000 from local investors according to Shiawassee County Sheriff's Dep. Herb Runyon.

> Merlin Goodrich, 39, now of rural Muskegon, and Harlan E. Orr, 71, president of the J.M.H. Development Corp., Muskegon, were taken into custody on the charges by Muskegon County Sheriff's deputies Monday and transferred to the Shiawassee County Jail later in the day. Goodrich is *charged with 19 counts of fraud, Orr, with 15.*
>
> Following arraignment this morning a preliminary examination for Goodrich was scheduled in District Court for Jan. 8 and his bond was set at $2,000. A December preliminary examination was scheduled for Orr, whose bond was set at $5,000.
>
> Charges against the two men stem from a proposed Chippewa Mall investment project, to be developed by J.M.H. Development, which the men claimed was to have been built on five parcels of land along E. M 21, between Herb's Auto Parts and the Owosso Auto Auction, Runyan said.
>
> Goodrich, who listed his occupation as pastor of a Muskegon church, and Orr reportedly approached area persons last April seeking twenty-five $10,000 investment subscriptions for the proposed 30-store, $250,000 mall. Runyan said the men had obtained five local subscriptions totaling $27,500, but that the monies had been returned to the investors Sept. 21 after a joint investigation of the project was under way by the securities division of the Michigan Department of Commerce, the county sheriff's department and Owosso post state police.
>
> Returning the money did not stop prosecution, Runyan explained, because *the fraud charges* are for the alleged sale of unregistered securities and for the alleged misrepresentation of securities offered for sale. The two men reportedly claimed the J. C. Penney Company had agreed to build an anchor store in the mall. Penney Company officials denied the claim, Runyan said.

Investigation of the project began when a local person involved in the investment transactions turned over evidence to detectives at the county sheriff's department, Runyan said. He added that at least 10 other persons and representatives of Newell Real Estate, 440 Corunna Ave., and Walker Realty, 211 E. Williams St., the two real estate firms which were handling the land for the project, had given statements implicating Goodrich and Orr in the *alleged swindle*.

Each charge of *fraud* against Goodrich and Orr carries a maximum sentence of three years in prison or a $5,000 fine, or both. [Emphasis added.]

Orr concedes that the basic factual statements contained in the story are true, but he objects to the characterization of his dealings as an "alleged swindle" and as "a phony shopping mall investment scheme that sought to take $250,000 from local investors." He also challenges the newspaper's description of the indictment as charging "fraud."

B. The Jury Instructions of the District Court

The District Court charged the jury that it should apply Michigan's common law privilege of fair comment, as follows:

> Under the Common Law rule of privilege, [there] is a qualified privilege for publications which are made in good faith on a matter of public concern and interest. The alleged libelous article published by the defendant in the Argus Press is entitled to this privilege if the article was published in good faith and without malice, for the criminal charges against plaintiff . . . was a matter of public concern and interest . . . . [An article is not published in good faith] if it is published either with knowledge of its falsity or with reckless disregard as to whether it is false or not. In order for a newspaper to have been reckless with regard to whether the article was false, the newspaper

> must have a higher degree of culpability than mere negligence or a failure to exercise reasonable care. Recklessness requires the defendants to have a high degree of awareness of the probable falsity of the article published.
>
> The language of this charge combines the language of Michigan's common law privilege with the language of the First Amendment privilege, as announced by the Supreme Court in a series of cases beginning with *New York Times* v *Sullivan, supra*.

The District Court left to the jury the question of whether the state's accusations against Orr amounted to fraud. The charge strongly suggests that the Court believed that the newspaper unfairly described the charges as "fraud":

> You must determine whether the alleged libelous article, when taken in its entirety and plain and nature meaning, expresses a fair and true report of the charges filed against the plaintiff and whether any inaccuracies would have changed the effect on the reader . . . . The article in question refers to these charges as being fifteen counts of "fraud."
>
> The term "fraud" has various meanings under the law. The general meaning of fraud is to induce another person to part with a valuable thing by means of deception, as by the intentional concealment of the truth.
>
> The Michigan securities law [de]fines:
>
> "Fraud" more broadly and does not require any intent to deceive. For purposes of this act, fraud includes anything less than full disclosure of a matter where lack of full disclosure would be misleading to a purchaser of securities. *Thus, the charges against plaintiff of misrepresentation cannot be considered as charges of fraud within the meaning of that Act.*

Since the term "fraud" has various meanings, the use of the term would be accurate but not fair. [Emphasis added.]

The jury apparently found that the words "fraud" and "swindle" were not justified by the facts that the newspaper acted with "malice" in publishing the article. We hold that on the specific facts of this case a jury could not reasonably find that the newspaper's characterizations of the proceeds were sufficiently inaccurate to permit a concomitant finding that the newspaper published article with "malice."

II. COMMON LAW LIBEL UNDER MICHIGAN LAW

Few areas of the law are as analytically difficult as that of libel and slander where courts attempt to mesh modern, first amendment principles with common law precedents. For the sake of clarity, we will discuss first the state law issues, then the Constitutional problems presented by this case; but as a legal and practical matter, the two approaches are found together.[1]

Initially, we consider the issues presented in this case under Michigan law: Is the article substantially true? If not, has the plaintiff proven that the newspaper published the story in bad faith?

A. The Defense of Truth

First, as the district court instructed the jury, the article is not libelous if substantially true. "To be true," the court correctly stated, "it is not essential that the literal truth be established in every detail as long as the article contains the gist of the truth as ordinarily understood." We believe that

[1] For a clear picture of the landscape in this changing area of the law, as well as a good description of the influences which are changing it, see Dean John Wade's lecture entitled "The Communicative Torts and the First Amendment," printed in 48 Miss. L.J. 671 (1977).

most, if not all, of the reporter's story on Orr is substantially truthful and therefore not actionable.

Neither Orr's complaint nor the opinion of the district court identified any specific, factual errors in the article. The story correctly reports that Orr was arrested and charged in a fifteen count indictment with various violations of the Michigan securities laws including making false statements to local investors that the J. C. Penny Company had agreed to lease a store in the proposed shopping center. It is also not disputed that the newspaper accurately reported the circumstances surrounding the shopping mall plan, including the amount of money Orr was trying to raise, the fact that the money was later returned, and the statements attributed to Deputy Runyon concerning the investigation.

The basis for Orr's complaint is the newspaper's characterization of Orr's activities as a "fraud," and "alleged swindle," and as "a phony shopping mall investment scheme that allegedly sought to take $250,000 from local investors." These expressions cannot easily be labled as "facts" or as "opinion." At least in regard to the use of the words "fraud" and "swindle," however, we believe that the use of those words as statements of fact was substantially accurate.

Contrary to the District Court's instructions to the jury suggesting that the word "fraud" is unfair in the context of this case, we believe it is both accurate and appropriate to describe a violation of Michigan's securities laws. The language of the state statute under which Orr was charged simply repeats the language of SEC Rule 10b-5, 17 C.F.R. §240.10b-5 (1977), adopted under the 1934 Securities Exchange Act, 15 U.S.C. 78j(b) (1976), which prohibits various forms of securities fraud. Both the Michigan courts, *People* v *Dempster*, 51 Mich. App. 612, 615, 216 N.W.2d 81, 82 (1974), and the courts of the United States, *Affiliated Ute Citizens* v *United States*, 406 U.S. 128 (1972); *SEC* v *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), have generally described the charges under these laws involving securities "fraud."

While the word "swindle" may imply more serious wrongdoing that was involved here, the word is frequently used used in colloquial speech as a substitute for "defraud." During the course of oral argument, in fact, Orr's attorney conceded, as he was bound to do, that if someone is accused of taking money from people by lying to them, the word "swindle" is a fair characterization of his actions. Although the word also connotes bad motive and an intent to defraud, the story as a whole sets forth sufficient facts concerning the circumstances of Orr's indictment and arrest for the reader to draw his own conclusion as to Orr's motives.

Much the same argument can be made that the characterization of Orr's actions as a "phony" scheme that sought to "take" $250,000 from local investors is the "gist of the truth." Certainly, Orr did "take" money from several local investors in attempting to raise a total of $250,000. The state did not charge in precise language that the whole plan was "phony." At least one part of it, the fictitious J. C. Penney lease, was plainly "phony" according to the indictment, and in view of the inferences in the indictment that Orr's development company was underfinanced, the word "phony" is not an unreasonable characterization of the whole enterprise.

At the same time, it is also true that the words "take" and "phony," like "swindle," were ill chosen and might well convey to many readers the impression that Orr was merely a flimflam artist planning to "take the money and run." The facts set out in the rest of the story, however, do no justify those inferences about the plaintiff. Thus, while we think the district court might well have directed a verdict at the close of the case on the ground that the evidence was insufficient to establish the article as a whole was an untrue description of the indictment, we do not rest our decision on that basis.

B. The Fair Comment Privilege

The newspaper's second, principal defense under Michigan law is that the plaintiff must prove that the newspaper

published the article in "bad faith" or with "ill will." As a story about a matter of public concern, the article is protected under state law by the qualified privilege of "fair comment." *Lawrence* v *Fox*, 357 Mich. 134, 97 N.W.2d 719 (1959); *Miner* v *Detroit Post and Tribune Co.*, 49 Mich. 358, 363-365 (1882) (Cooley, J.). *See* RESTATEMENT OF TORTS, §§606, 607 at 275-285 (1938). *Accord, Nuyon* v *Slater*, 372 Mich. 654, 127 N.W.2d 369 (1964); *Bufalino* v *Maxon Brothers, Inc.*, 368 Mich., 140, 153; 117 N.W.2d 150, 156 (1962). Everyone, citizen or reporter, has the right to comment on matters of public importance, and expressions of opinion and even misstatements of fact are not actionable in a libel suit unless made maliciously for the purpose of damaging another's reputation.

Negligence on the part of the newspaper is not sufficient to establish liability. Scienter is required. If the statement "be honestly believed to be true, and published in good faith," there is no scienter and no liability. *Lawrence* v *Fox*, *supra*, 97 N.W.2d at 723, *quoting Powers* v *Vaughan*, 312 Mich. 297, 305, 20 N.W.2d 196, 199 (1945), and *McAllister* v *Detroit Free Press*, 76 Mich. 338 (1889). As long as the defamatory opinion is honestly held or the misstatement of fact is believed in good faith to be true, the statements are protected by the privilege.

As previously set forth, the charge to the jury accurately stated the Michigan privilege of fair comment and the applicability of that standard is not questioned by either party before us.

The District Court's opinion relied principally upon the following evidence as demonstrating the newspaper's bad faith:

> The newspaper's witnesses admitted that the article as published did not follow the Associated Press printout. The article was prepared in haste with the acting editory directing the reporter to change the story so that it did not merely repeat the story pro-

vided by the Associated Press. This the reporter did, and although the reporter testified that the change was based on his notes from interviews with Deputy Runway, these notes were not produced but were claimed to have been lost.

This "evidence" does not warrant a finding of bad faith. That the newspaper ordered the reporter to rewrite an Associated Press account of Orr's indictment hardly demonstrates bad faith; it is standard practice. By rewriting the wire service story and adding additional information, the newspaper may then run the article under the by-line of one of its own reporters rather than as an Associated Press story.

Under any interpretation of the evidence, to allow this jury verdict to stand would turn the "malice" standard, the bad faith requirement, into a bare fiction. There is no evidence at all in the record to support a reasonable inference that the reporter or the editor for the newspaper did not believe that the state had charged Orr with fifteen counts of securities "fraud" involving a scheme to obtain or "take" money from investors by misrepresentation.

The District Court's error in its instructions in discussing the word "fraud" may explain why the jury went astray in this case, or the case may be a good example of the validity of Dean Prosser's criticism apparently shared by Dean Wade, that the "malice" standard may be so subjective and confusing to a jury as to be meaningless and vanish into a standard of strick liability. W. Prosser, Law of Torts, §115 at 795, §118 at 821 (4th ed. 1971); *Wade, supra* n. 1, at 686. The jury must have concluded, based on the court's instructions, that the use of the world "fraud" to describe the charges against Orr was incorrect or unfair. Despite the court's instructions on malice, the jury must have then viewed the defendant as strictly liable for its error.

Whether this is an accurate analysis of the jury's deliberations is beyond our competence, but there is no evidence in this record that the newspaper thought its story was false or

investigated and wrote the story with the kind of "I-don't-care-about-the-truth" state of mind that would be the requirement of scienter under the subjective standard. This case suggests that courts must be careful about letting libel cases go to the jury under the standard where there is no proof that the reporter of the newspaper knew or suspected that the statements in the article were false. *See Nuyen* v *Slater, supra,* 127 N.W.2d at 373; *Raymond* v *Croll,* 233 Mich. 268, 275-76, N.W. 556-558 (1925) ("If the circumstances relied on as showing malice are as consistent with its nonexistence as its existence, the plaintiff has not overcome the presumption of good faith and there is nothing for the jury.)

III. FIRST AMENDMENT PRINCIPLES GOVERNING LIBEL

Many of the state law issues we have just discussed have been subsumed in and altered by constitutional holdings. Our opinion today therefore rest both on state law and the first amendment. The constitutional issues presented are: Whether the defamatory words are protected as statements of opinion? If not, and if we consider the words as statements of fact, was Orr a "public figure" for purposes of the first amendment? If so, did the newspaper act with a reckless disregard for the truth of the statement?

A. Statements of Opinion Protected under First Amendment

It is now established as a matter of constitutional law that a statement of opinion about matters which are publicly known is not defamatory. As the Supreme Court said in *Gertz* v *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974): "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

Based on *Gertz* and other Supreme Court opinions, the American Law Institute, in its recent revision of the chapters on libel in the Restatement of Torts, adopted the following statement of the *Gertz* principle:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
>
> Comment:
>
> c. . . .
>
> It is the function of the court to determine whether the expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct. . . .

RESTATEMENT (SECOND) OF TORTS § 566 (1977).

The ALI illustrates this principle by hypothesizing two cases, one where the defendant writes that the plaintiff "sits around in his back yard with a drink in his hand and therefore must be an alcoholic," and the other where the defendant, without revealing any factual basis, simply says that the plaintiff "is an alcoholic." The first is an expression of opinion based on revealed facts and is, therefore, not actionable, while the second is an expression of opinion based on undisclosed facts. The ALI explains the distinction as follows:

> A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication.

Id.

Two other illustrations by the authors of the Restatement are relevant to the instant case:

> 1. A real estate developer, was attempting to persuade the city council to grant a zoning variance on certain land which he owned. The city desired to purchase another tract of land owned by him for a school site. In negotiations about the purchase price, A indicated that his agreeing to the city's offer might depend on his getting the variance. At a council meeting this position was described by a council member as blackmail. B, a newspaper, carries a full and accurate account of the council meeting, including a statement of A's negotiating position. It quotes the "blackmail" statement and itself uses that term and the term "skullduggery." The statement cannot be construed as charging that A committed the crime of blackmail and B is not liable for defamation. [The facts and holding of this hypothetical are taken directly from *Greenbelt Cooperative Publishing Ass'n* v *Bresler*, 398 U.S. 6 (1970).]
>
> 2. A, an employee, refused to become a member of the union recognized as the collective bargaining agent. The union publishes statements calling A a scab. In one statement to this effect it publishes a well-known definition of a scab, characterizing him, among other things, as a "traitor to his God, his country, his family and his class." The language cannot be construed as a charge that A was guilty of treason and B is not liable for defamation. [This case is taken from the Supreme Court opinion in *Letter Carriers* v *Austin*, 418 U.S. 264 (1974).]

Id.

If we substitute the words "swindle," "fraud," or "phony scheme" for "skullduggery" or "traitor," we see that, to the extent the allegedly libelous words constitute opinion, as opposed to facts, the words are not defamatory.

In the instant case, as we have discussed, it is not disputed that the reporter accurately reported the underlying facts concerning Orr's indictment and arrest and that the only basis for Orr's complaint is that the reporter characterized the shopping mall proposal in strong terms which implied that the indictment charged that Orr was dishonest and had attempted to defraud local investors. Under the rule adopted by the American Law Institute and our own understanding of the protections of the First Amendment, the newspaper's "opinion" about the meaning of the indictment cannot be made the basis of a libel suit against the newspaper.

B. The First Amendment Principle Requiring "Actual Malice"

If, on the other hand, we consider the allegedly defamatory words as "facts" rather than opinion, the issue becomes more clouded. If the plaintiff is a "public figure," misstatements of fact are not defamatory unless made with knowledge of their falsity or with a reckless disregard for the truth of the statements. *Gertz*, *supra*, 418 U.S. at 334-36 n. 6; *Curtis Publishing Co.* v *Butts*, 388 U.S. 130 (1967); *New York Times* v *Sullivan*, *supra*. The standard is similar in practice to the Michigan "fair comment" privilege. While the state standard emphasizes the subjective good faith of the publisher, the constitutional definition of malice is more concerned with showing the publisher's subjective reckless disregard for accuracy. It is theoretically possible, in other words, that a newspaper might subjectively believe in good faith that a statement is true under state law and, at the same time, publish the statement without sufficient regard for its truth under the first amendment. We do not believe the evidence is sufficient to support a finding of malice under either of the subjective tests. If we convert these subjective

"malice" standards into a more objective test, as suggested by Deans Prosser and Wade and Justice Harlan, we find no evidence that the defendant was guilty of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers." *Curtis Publishing Co.*, 388 U.S. at 155 (Harlan, J.).

1. Interpretation of Official Documents. — A subsidiary first amendment principle concerns statements describing or summarizing official documents. In cases where the plaintiff is *a public figure* for the purpose of the "malice" standard, the Supreme Court has held in *Time, Inc.* v *Pape*, 401 U.S. 279 (1971), that any rational interpretation of a public document is a sufficient defense as a matter of law to a suit for defamation. Specifically, the Court held in *Pape* that a newspaper's choice of one or several possible interpretations of an ambiguous government document is not enough to create a jury issue of "actual malice." The Court observed:

> [A] vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reporters, speeches, press conferences, and the like. The question of the 'truth' of such an indirect newspaper report presents rather complicated problems.
>
> . . . .
>
> Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of the jury.

401 U.S. at 285-86, 291.

2. The "Public Figure" Test. — We believe that Orr is a "public figure" for the limited purpose of reporting on his

arrest and indictment and the circumstances surrounding the collapse of his shopping mall proposal. Although not every lawyer and litigant involved in a judicial proceeding is a "public figure," according to the *Gertz* case and *Time, Inc.* v *Firestone*, 424 U.S. 448 (1975), it appears from the reasoning of these opinions that a criminal defendant would be classified as a "public figure" where, as here, his conduct in the community is a legitimate matter of public interest, the press has publicized his conduct in part as a result of his own efforts to obtain publicity, and his conduct has made him the target of a criminal proceeding about which the public has a need for information and interpretation.

There is no doubt that the development of a large shopping complex in the Owosso, Michigan, area was of interest and importance to the people of that region. The Argus Press had previously published — with Orr's cooperation — a front page story about the proposed mall and its developers. When the project later fell through amid charges of fraud and misrepresentation, certainly Orr was a "public figure" within the meaning of the test established in *New York Times, Butts, Gertz* and *Firestone*. He voluntarily sought publicity for his project and then found himself, through his own alleged misdeeds, at the center of a public scandal. We believe that application of the constitutional "actual malice" test is fully warranted under these circumstances and that the *Pape* decision protects the newspaper from a liability as a matter of law. The newspaper's interpretation of the indictment as implying that Orr was attempting a "swindle" or to "take" money from local investors is, as we have previously discussed, a rational interpretation of the charges.

IV. POLICY REASONS JUSTIFYING PROTECTION OF THE PRESS UNDER THE MALICE STANDARD

This case demonstrates the need for principles of libel law which loosen the constraints that a standard of strict

liability would otherwise impose on the press. The adverse publicity in this case arose because the state brought criminal charges against Orr for securities violations, not because the newspaper independently decided to investigate, embarrass, or invade the privacy of an individual about whose conduct the public has no legitimate need for information. Orr was charged with securities fraud in the development of a new center for public shopping in a small community and with misleading potential local investors.

The publicity which the press gives to such cases plays an important role in our system of criminal justice because it informs the public about the law, warns the public of harm and serves to deter law violations. The press functions in such cases as one of the sanctions in our system. Only by receiving information about our legal system, including its defects and mistakes, can the public learn about the law and the moral principles on which it is based, as well as the law's capacity for self correction and stability. In reporting on this case, therefore, the newspaper was simply performing its assigned role.

Like the readers for whom they write, few newspaper reporters are lawyers; yet they must often report under a short deadline complex accusations and arguments in colloquial language that the average reader can understand. Sometimes, as in this case, lawyers have spent hours preparing charges and arguments that the reporter must summarize in a few short paragraphs in a few minutes.

Because of the public importance of reporting on cases of this kind, the law must allow some leeway for misinterpretation and error. Lawyers and judges sometimes make mistakes about the facts of cases, misinterpret the law or state one side of the case too strongly or with words and labels which may be inappropriate. They are insulated from liability for such conduct by an *absolute* privilege, not a qualified privilege. For similar reasons, the common law, and the Supreme Court in construing the first amendment, have erected principles which protect the press from liability

for mistakes when reporting on public proceedings, officials, and persons in whom the community has a legitimate interest and a need for information and interpretation. An individual's interests in privacy, a good reputation, honor and equanimity are important values which the law must continue to protect. These interests must give way in part, however, when the citizen's public deeds arguably harm or seriously affect the interests of a significant number of his fellow citizens.

The judgment below is therefore reversed and the case remanded to the District Court for dismissal of the action.

APPENDIX B

JUDGMENT

At a session of said Court held on the 19th day of October, 1978.

This Judgment is entered upon an appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On consideration hereof IT IS HERE ORDERED AND ADJUDGED by this Court that the Judgment of the said District Court in this cause be and the same is reversed and the cause remanded for dismissal of the action.

IT IS FURTHER ORDERED that the Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

JOHN P. HEHMAN
Clerk

$ 50.00 Filing Fee
$3,600.14 Costs
November 17, 1978 — Issued as Mandate

APPENDIX C

MEMORANDUM OPINION AND ORDER DENYING MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL

(Filed May 17, 1976)

At a session of said court, held in the Federal Building, Flint, Michigan on May 17, 1976.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This is a civil diversity action for alleged libel under the laws of the State of Michigan. Following a trial by jury, judgment was entered in favor of the plaintiff on March 24, 1976, awarding plaintiff $5,000.00 as compensatory damages and $15,000.00 as exemplary damages. Defendant has moved the Court for judgment notwithstanding the verdict or in the alternative for a new trial pursuant to Rules 50 (b) and 59, Federal Rules of Civil Procedure.

Pursuant to Local Rule IX(j), Rules of the United States District Court for the Eastern District of Michigan, the Court in its discretion will decide the above matter without oral argument.

Defendant has raised many issues in its motion, many of which are not commented on in its brief, which issues were considered thoroughly by the Court at trial. These issues will not be fully rediscussed at this time.

After due consideration of the issues raised by defendant, with the Court being fully advised in the premises, the motion will be denied.

Defendant claims that there was no showing of malice which would rebut the application of the qualified privilege under Michigan law. Malice under Michigan law has objective as well as subjective elements. It includes not only subjective hostility, spite, or ill-will, but also reckless disregard for the truth. *Lawrence* v *Fox*, 357 Mich 134,

141-144 (1959); *Nuyen* v *Slater*, 372 Mich 654, 660 (1964); *Gross* v *Abernathy*, 47 Mich App 703 (1973).

The Court finds sufficient evidence from which the jury could conclude that defendant acted with reckless disregard for the truth. The newspaper's witnesses admitted that the article as published did not follow the Associated Press print-out. The article was prepared in haste with the acting editor directing the reporter to change the story so that it did not merely repeat the story provided by the Associated Press. This the reporter did, and although the reporter testified that the change was based on his notes from interviews with Deputy Runyan, these notes were not produced but were claimed to have been lost. The reporter also could not recall when he had talked to Deputy Runyan other than when the investigation against plaintiff had just begun. He could not recall whether he had checked the court file, but as the story appeared immediately after the charges against plaintiff had been issued, and with the story being prepared in haste at the last moment, it seemed very unlikely that the allegations in the article were derived from the court file. Even if they were, the file did not support much of the matter set forth in the article.

Deputy Runyan also did not recall when he had any interview with the newspaper reporter. He did testify that he must have talked with the reporter, for he recognized his face. Deputy Runyan went on to volunteer that the interview must have taken place at plaintiff's arraignment on charged violations of the Michigan Securities Act, giving as his reason that all of the reporters would have been present and spoken with him at such an important event. The reporter for the Argus Press testified, though, that he was not present at plaintiff's arraignment.

The newspaper witnesses were vague and evasive. They were unable to recall the steps taken to investigate the story. They could not produce evidence of their investigation. Against this must be contrasted the stark fact that the newspaper article as printed at the very top of the front page

of the Argus Press differed dramatically from the story distributed by the Associated Press. From these facts, the jury could reasonably have concluded that the newspaper had not based the story on information received from reliable sources but had acted in haste and injected speculation, rumor, and suspicion in order to spectacularize the account of the proceedings against plaintiff. The jury could likewise conclude that defendant had a high degree of awareness that the matter added to the Associated Press release was not based on reliable information and was in all probability false. The newspaper witnesses' unsupported assertions to the contrary lacked credibility.

As the jury could find that defendant newspaper acted with malice by showing a reckless disregard for the truth, the jury could conclude that the Michigan qualified privilege was not a bar to compensatory damages. *Lawrence* v *Fox, supra; Nuyen* v *Slater, supra.* For the same reason, the jury could award plaintiff punitive damages under Michigan law without infringing on the protective policies embodied in the First Amendment. *Gertz* v *Welch*, 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974); *Time Inc* v *Firestone*, US , S Ct , L Ed 2d , 44 LW 4262 (3/2/76).

Defendant also claims that the newspaper article was privileged as it was a fair and accurate report of the criminal proceeding initiated against plaintiff. MCLA 600.-2911; MSA 27A.2911. The article did not limit itself to the charges against plaintiff and fair comment on those changes as is contended by defendant but went on to describe the investment scheme as a swindle and an attempt to take $250,000 from local investors. It was for the jury to determine whether these characterizations and comments by the newspaper were a fair and accurate report of the criminal proceedings and whether any difference would have produced a different effect on the reader. *McCracken* v *Evening News*, 3 Mich App 32 (1966). Likewise, it was for the jury to determine whether the article when taken in its entirety was substantially true. *Bonkowski* v *Arlans*, 383

Mich 90 (1970); *Poledna* v *Bendix Aviation Corp*, 360 Mich 129 (1960); *Grist* v *Upjohn*, 16 Mich App 452 (1969). The jury had sufficient evidence on both issues to find in favor of the plaintiff.

The Court also finds sufficient evidence from which the jury could return a verdict for compensatory damages.

The remaining issues raised by defendant are not concerned with the sufficiency of the evidence but alleged errors at trial. Defendant claims the Court erred in failing to instruct the jury that mitigating circumstances could be considered in determining compensatory damages. Defendant relies on MCLA 600.2911 (3), MSA 27A.2911 (3), which states in relevant part:

> "In any action for slander or for publishing a libel even though the defendant has pleaded or attempted to prove a justification he may prove mitigating circumstances including the source of his information and the ground for his belief."

Defendant claims that under this statute, the jury should have been instructed that it could consider evidence of defendant's lack of malice to mitigate damages.

There are two problems with defendant's argument. The first is that the statute does not authorize the reduction of compensatory damages because of evidence of lack of malice. Rather, the statutory provision is aimed at the Michigan rule that a plaintiff's compensatory damage award may be increased as a result of malice by the defendant. The Committee Comment to the statute states:

> "This section is drawn entirely from the present statute and should therefore be considered in light of the interpretation of the present statute. Note especially the cases of Schattler v Daily Herald Co., (1910) 162 Mich 115 and Rabior v Kelley, 194 Mich 107 (1916) which state the proposition that although the plaintiff is limited to actual damages, actual

damages may be increased and augmented as a result of the malice of the defendant."

The statutory comment makes it plain that the statute allows a defendant to prove lack of malice where the defendant has attempted to prove truth as a defense in order to keep compensatory damages from being increased.

In *Schattler* v *Daily Herald Co*, 127 NW 42, 162 Mich 115 (1910), it was so held. The Court ruled that while actual damages may be increased by the reason of the malice of the defendant, in no case may good faith serve to mitigate the damages which plaintiff actually suffers.

The Court instructed the jury that it may award plaintiff only the actual damages suffered by plaintiff in any award for compensatory damages. The Court fully complied with the statutory provision in a way completely favorable to defendant.

Secondly, the jury considered the issue of malice in regards to the applicability of the qualified privilege under Michigan law. The jury was instructed that if it found that defendant acted without malice, it must return a verdict of no cause of action. In regards to this instruction, the jury was informed that the burden was on the plaintiff to prove that defendant acted with malice. Thus, the jury was instructed to return a verdict for defendant unless plaintiff had proven malice by a preponderance of the evidence.

Defendant claims that the jury should also have been instructed that it could consider the lack of malice to mitigate compensatory damages. However, if defendant was not able to prevail on this issue when the burden was placed on the plaintiff, it is difficult to see how defendant could have prevailed on the issue in regards to mitigation when the burden would have been on itself. To have instructed the jury in the manner requested by defendant would have been both contradictory and confusing.

Defendant claims as error the admission into evidence of letters received from prospective lessees in the proposed shopping mall as business records. Even if such were error, such error was harmless, as plaintiff introduced into evidence the depositions of the prospective lessees. Moreover, there was nothing in the letters which could be construed as prejudicial to defendant.

After complete consideration of the matter, the Court finds that the letters were a trustworthy account of the proposed transaction between plaintiff and the prospective lessees, which were admissible under 803 (6) of the Federal Rules of Evidence.

The Court finds no merit in the other matters raised by defendant. Accordingly, the motions are hereby DENIED.

IT IS SO ORDERED.

(s) James Harvey
United States District Judge

APPENDIX D

ORDER

At a session of said Court, held in the Federal Building, Flint, Michigan on December 18, 1978

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

Pursuant to the judgment of the Court of Appeals for the Sixth Circuit filed with regard to the above-captioned case with this Court on November 21, 1978, IT IS HEREBY ORDERED that the action be dismissed.

IT IS SO ORDERED.

JAMES HARVEY
United States District Judge

Supreme Court, U. S.
FILED
FEB 17 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1121

HARLAN E. ORR,
Petitioner,

v.

THE ARGUS-PRESS COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

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THE ARGUS-PRESS COMPANY,
Respondent.

No. 78-1121

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the petitioner, Harlan E. Orr, was a public figure in the context of the newspaper article reporting his arrest and criminal indictment for violation of the Michigan securities fraud statute in the development of a proposed shopping mall.

2. Whether the respondent, The Argus-Press Company, under the constitutional privilege afforded by the First Amendment in the publication of the newspaper article under the circumstances acted in reckless disregard of the truth of the statements contained in the article.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom . . . of the press; . . ."

The privileges afforded to citizens of the United States were protected from state action by the following provision in the Fourteenth Amendment to the Constitution:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

In this diversity case, petitioner sought to enforce under Michigan law a libel action for damages.

STATEMENT OF THE CASE

Respondent finds certain inaccuracies and omissions in the statement of petitioner.

Petitioner in his efforts to develop the proposed shopping mall to be known as the Chippewa Mall sought the assistance of the local Chamber of Commerce (1a). Orr requested and obtained assistance and cooperation of local governmental agencies relative to zoning, annexation and the extension of utilities to the proposed shopping mall (1a). A written prospectus was prepared to be utilized in the solicitation of financing the project from local investors (3a, P. Ex. 38). Petitioner through his associate obtained a front page news release concerning the initial announcement of the proposed mall development (11a, D. Ex. 61). Petitioner sought to raise the sum of $250,000 from local investors to purchase the land site for the proposed mall (4a). More than thirty-seven local people were directly

solicited by the petitioner and his associates (16a). Petitioner had prior history of unlawful conduct with respect to the Michigan securities fraud law (8a, D. Ex. 59).

The reporter assigned to cover the story for respondent examined the District Court file, interviewed the arresting officer, Herbert W. Runyan, reviewed the prior Associated Press story released and heard the local radio report of the matter concerning the arrest of the petitioner. Following the arraignment on November 20, 1973, the reporter talked by phone with the District Court concerning what occurred just prior to press time. The reporter destroyed his notes on the story at the time he terminated his employment with respondent (13a).

The petitioner does not deny that the underlying facts contained in the newspaper article were true and accurate. Orr claimed that the characterization of the incident in the headline and newspaper article were slanderous, by the employing of the terms *fraud, phony* shopping mall *scheme* and alleged *swindle* to the criminal charges. The face sheet of the District Court criminal file employed the term *fraud* in describing the charge (34a, P. Ex. 66).

Respondent through its attorney sought to have Orr approve the content of a retraction which petitioner did not do and therefore no retraction was published (8a).

There is no evidence in the record to show ill will, spite or malice on the part of the respondent or its employees concerning the petitioner and his associate, Merlin Goodrich (9a).

The story dispatched over the Michigan newspaper wire by the Associated Press before the newspaper article was clearly more defamatory of the character of the petitioner and did not contain the underlying facts truthfully reported in the newspaper of respondent (35a, D. Ex. 69).

ARGUMENT

1. THE DEVELOPER OF A PROPOSED SHOPPING MALL WHO SEEKS LOCAL GOVERNMENT AND PUBLIC SUPPORT FOR THE PROJECT IS A PUBLIC FIGURE WHEN SUBSEQUENTLY CHARGED WITH CRIMINAL ACTIVITY IN PROMOTING SUCH DEVELOPMENT

The court of appeals correctly ruled that the petitioner, Harlan E. Orr, was a "public figure" as that term has been constitutionally defined in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). This Court in the *Gertz* case defined public figures,

> "Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

Orr by his own conduct placed himself at the center of a public attention in the community where the proposed shopping mall was to be developed. Through his business associate, petitioner obtained local publicity from the respondent in a front page story announcing the project. Orr sought and obtained the cooperation and assistance of local governmental agencies relative to zoning, annexation and extension of utilities to the proposed site. Petitioner sought financial support for the project from local investors.

The alleged libelous statements were contained in a newspaper article reporting the arrest of the petitioner and his associate. The criminal charges arose because Orr and his associates attempted to obtain local investors through illegal sale of securities, misrepresentation and failure to disclose material facts concerning the development. Petitioner previously had involved himself in a similar controversy concerning the securities fraud law in promoting a mall development in another locality in Michigan. Orr through his own conduct became a public figure in the controversy over the development of the proposed mall in the small community. Petitioner previously demonstrated accessibility to the media in his initial announcement of the mall published in the newspaper of the respondent. Within this factual setting, petitioner was clearly a public figure.

Under the legal principles developed in the *Curtis Publishing Co.* case, it is incumbent upon the court of appeals to determine if the libel charged concerns a "public figure". In the instant case, the court of appeals properly exercised its constitutional duty and determined Orr to be a public figure. Such determination is fully consonant with the recent decision of *Wolston* v. *Readers Digest Association, Inc.*, 578 F.2d 427 (D.C. Cir. 1978). The factual setting of the case at bar is very similar to *Greenbelt Cooperative Publishing Association* v. *Bresler*, 398 U.S. 6 (1970). In the *Greenbelt* case, the Supreme Court had no difficulty concluding that Bresler was a public figure.

The petitioner has not cited any issue considered and decided by the court of appeals which involves a federal question which has not been settled by the prior opinions of the Supreme Court. *Time Inc.* v. *Firestone*,424 U.S. 448 (1976) is clearly distinguishable on its facts from the case at bar. Mrs. Firestone was a private citizen seeking the dissolution of her marriage. Public interest in a matter is not

equivalent to public controversy. There was nothing in the publicity of the Firestone divorce proceedings which affected the rights of others. In contrast, the publicity of the Orr criminal indictment apprised the public in the Owosso-Corunna community of the possible risk or harm that could occur to any one solicited as a possible investor in the project. This was the very purpose for the enactment of the Michigan securities law.

2. THE RECORD DOES NOT SUPPORT ANY INFERENCE OR FINDING THAT THE NEWSPAPER DOUBTED THE ACCURACY OR RELIABILITY OF ITS SOURCES AND DEMONSTRATED AN ATTITUDE OF RECKLESS DISREGARD FOR THE TRUTH OF THE STATEMENTS IN THE ARTICLE

Petitioner does not claim and cannot show that the decision of the court of appeals departed from the accepted legal principles of the doctrine developed in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Petitioner concedes that the constitutional privilege of the *New York Times Co.* case is applicable to the instant case. The court of appeals exercised its constitutional duty in reviewing the record to determine if there was sufficient evidence to overcome the subjective malice standard required by the First Amendment. *St. Amant* v. *Thompson*, 390 U.S. 727, (1968) and the *Gertz* case mandate such a review. The appellate court did not find any evidence to support a finding of reckless disregard for accuracy. The reporter and the newspaper believed the article to be true and had nothing upon which to entertain serious doubts as to its accuracy. *St. Amant* v. *Thompson, supra.*

The conduct of the agents of the newspaper following publication as established by the record did not prove lack of good faith in the publication. The court of appeals reviewed all the conduct and actions of the agents of the newspaper.

The conduct of the agents of the newspaper following publication as established by the record did not prove lack of good faith in the publication. The court of appeals reviewed all the conduct and actions of the agents of the newspaper. There is nothing in the record to indicate that the conduct of the agents was any different prior to, at the time of, or after publication of the article. There is no necessity to determine or attach special significance to the actions of the agents after the publication of the article because their actions remained consistent. The same issue was raised in *Hutchinson* v. *Proxmire*, 579 F.2d 1027 (7th Cir. 1978).

Counsel for the petitioner concedes that the respondent was entitled to the common law qualified privilege in Michigan as defined in *Lawrence* v. *Fox*,357 Mich. 134 (1959). The respondent is entitled to a presumption of good faith which must be overcome by evidence of improper motive or reckless disregard for truth or accuracy. Mere negligence on the part of the newspaper is not sufficient to establish malice. *Peisner* v. *Detroit Free Press, Inc.*,82 Mich. App. 153 (1978), does not alter this doctrine. The court of appeals upon review of the record found insufficient evidence to overcome this qualified privilege. In its judgment, respondent was entitled to summary judgment at the close of all proofs. There is no indication that the local law applied in this diversity case was not in accordance with the accepted principles developed under Michigan law.

Finally petitioner poses the issue of accuracy in reporting of judicial and public proceedings. Under the holding in *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), any rational interpretation of an ambiguous public proceeding or report is protected by the First and Fourteenth Amendment from actionable libel for inaccuracy. The *Firestone* case also involved interpretation of an ambiguous public documents. However, the plaintiff in the *Firestone* case was not determined to be a public figure and therefore the publisher did not have the benefit of the subjective malice standard required by the *New York Times* privilege.

This court on January 8, 1979, granted certiorari in *Wolston* v. *Reader's Digest Association, Inc.*, supra, and *Hutchinson* v. *Proxmire*, supra, to review the constitutional definition of "public figure" in the light of the *Firestone* decision. Both the *Wolston* case and the *Hutchinson* case pose questions beyond the scope of the decision in the instant case, that is, the effect of the passage of time and the involuntary presence in the matter of public concern.

CONCLUSION

Petitioner has failed to establish special and important reasons for this Court in its sound judicial discretion to grant the petition. No conflict with settled law or significant federal question is raised by the decision of the court of appeals. Respondent requests that the petition be denied.

Respectfully submitted,

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February 7, 1979

APPENDIX OF RESPONDENT

INDEX TO APPENDIX

TESTIMONY OF HARLAN E. ORR

Q. (By Mr. Kobza): All right. We will concentrate on the Owosso one right now. As a description, keep that in mind. Mr. Orr, when did you first, and under what circumstances did you first become interested in Owosso as a potential project?

A. In the Fall of 1972.

Q. How did that come about?

A. Mr. Goodrich in our office was telling me that he formerly lived in Owosso, that his father lived over there and that he had been over there visiting him and he felt that Owosso would be a good spot for developing one. He had one or two inquiries concerning locations over in that area from some of his proposed tenants.

Q. All right. That is while he was working for the J.M.H. as a leasing agent?

A. Right, right.

Q. All right. What did you do, then?

A. We went, he and I made a trip to Owosso in the early Fall and prior to this time I think I contacted, I told him to get whatever he could get. He contacted the Chamber of Commerce in Owosso and got all the information that they had on the city and the economics of the area. Then, we made a personal visit over there, a sort of an inventory of the retail outfits that were existing there and then following that, we approached a real estate firm in Owosso so we could get a lay of the land around the area, the land that might be available and what utilities were there.

Q. All right. Were there any site problems that required your attention in regards to zoning or utilities?

A. These properties that we were, that we finally got the options on was along toward the end of June when we got all five of them signed up.

Q. Part of it had to be resigned?

A. Yes. Part of it was outside the corporate limit of Corunna and/or in the Township of Shiawasee, so they had

to be annexed, part of that into Corunna and then we had the city water and sewage problem to work out with the City of Corunna. They hadn't done very much of expansion of their little plant which they were not going to do any expansion of that little plant pending a promotional deal with the Federal Government to take about three of the four of the townships into one unit and build one big combined sewage system for the whole area, but they finally, with our engineers and the city engineers concluded that temporarily, at least, we could get into that small disposal plant they had but we would have to pay the expenses of residential connections all the way and it was projected by the engineers. That run from Ann Arbor, which was a city area for Corunna and our engineers, they came up with the costs of about between $75,000 and $100,000, and we agreed for by that time we had gotten the land and we agreed with the City we would pay that. We would have the City water and sewers run out there from the municipality of Corunna.

Q. Did you, yourself, ever meet with the City officials of Corunna?

A. Yes, oh, yes. We had three or four meetings, evening meetings and daytime meetings with their engineers and with their City Manager until they finally concluded a way to build that thing in their bailiwick.

Q. And you say the conclusion of this agreement was that your, that the development company would stand the cost?

A. Yes, we would stand that cost.

Q. Who handled the zoning matter, the zoning and the annexation problems?

A. The City Attorney who I later learned was Mr. Kelly of Corunna in the City and he felt that annexation, he would, of course, handle that, and he had his paperwork and eye for it and would be ready to go on that by the time we completed in the early Fall, early September.

MR. KOBZA: I offer Exhibit 38.

THE COURT: Any objection?

MR. DES JARDINS: We have no objection.

THE COURT: The Court will admit Plaintiff's Proposed Exhibit 38.

Q. (By Mr. Kobza): All right. Mr. Orr, I'm not going to request that you read this entire proposal, but as we come to the page which is entitled "Chippewa Mall, Owosso, Michigan, project" in the middle of the page, is the set of figures entitled "Costs", will you relate what that detail is and what it is the cost of and then read it verbatim?

A. The cost of construction was projected.

Q. Of what?

A. Of the building of the mall, building 202,000 square feet, $3,500,000 on the basis of $12 a foot. Parking lot 2,500 covering 26 acres was at $5,000 an acre was projected $130,000. The architects fees, 6 percent was $210,000. The mortgage fee of 2 percent was $100,000. The land cost $690,000. The developer fees or profit which we were to receive 6 percent $270,000 and we had a contingency fund of $100,000. We were looking for a mortgage of $5,000,000, 100 percent financing based upon the leases.

Q. All right. Now, who is the "we" that was to receive the development fee of $270,000?

A. The J.M.H. Development Company.

Q. All right. And how did — on what basis did you set forth in there land costs of $600,000? The purchase price of these five pieces reflected in the previous exhibits was $440,000.

A. For the five pieces and the cost of all the improvement and development is set out in this Exhibit here as $250,000. Now, the $250,000 the cost of developing the land and improving it was added to the cost of the land making it $690,000 as the value of the land after the improvements were all done and all the development is finished somewhere here—

Q. All right. Are these other fees or costs and fees estimates or did you have any other basis for determining the accuracy of the amounts?

A. Well, the architect fee is pretty well standard. Our architect was doing them all for 6 percent, so we deducted 7 percent. The mortgage is either 1 or 2 percent, in some cases 2 and in some cases only 1. A developer's fee is included by all of the mortgage companies as a profit factor for the developer running 6 and 7 percent. Several of them allow in their financing figures 7 percent as a reasonable profit for the developer. We figured 6 percent on this one in Owosso.

Q. All right. What is the page "predevelopment"? What does that page set forth?

A. These are projections that our office made of the predevelopment costs that could be reasonably anticipated prior to actual start of the construction of the building.

Q. And what is the total on that page?

A. The total is $250,000.

Q. And is that the same $250,000 that you were talking about with regard to increase over cost of the land?

A. That is the same $250,000.

Q. Would you detail what is included in the $250,000?

A. Miscellaneous office expense, telephone, postage and legal on the leasing about twenty-four months work, expenses of the new corporation; feasibility and mortgage application expenses, topo-survey-soil tests; living expenses for two men on the road for the next two years; the zoning and expenses for architects and engineering work for the next two-year period and travel expenses; the land clearing and the installation of the utilities $250,000.

Q. And now, does this $250,000 relay in any way to the solicitation of the local investors?

A. It does.

Q. In what way?

A. That is the capitalization to be made, the capitalization of the Chippewa Land Company which was to be owned by the local people.

Q. And how much money did you expect to obtain from the local investors?

A. $250,000.

Q. If you obtained that amount of money, how would it be spent?

A. It would be spent from the program here, predevelopment costs.

Q. It would be applied to the costs as estimated here, is that correct?

A. That is correct.

Q. All right. Did the Michigan Department of Commerce undertake an investigation of you and J.M.H. Development Corporation in connection with this Snowflake Mall?

A. They did of J.M.H. Development but not me.

Q. What you testified on direct examination—strike that. I will withdraw the question. Mr. Orr, when did that investigation commence?

A. Well, the latter part of '71 or '72 and it was after, reported after the formation of Snowflake Mall and after we were in business and acquired the land and had gone ahead; sometime after that.

Q. Are you sure that the proceedings were directed only against J.M.H. Development Corporation?

A. That is my understanding. That is the way I recollect it.

Q. Mr. Orr, I am going to show you Defendant's Proposed Exhibit 59 and ask you to read the entitlement of that Exhibit.

MR. KOBZA: Read the what?

MR. DES JARDINS: The entitlement.

A. "In the Matter of Harlan Orr and J.M.H. Development Corporation —"

MR. HILL: I didn't understand that. Can you repeat that?

A. It says "In the Matter of Harlan E. Orr and J.M.H. Development Corporation, respondents." Yes, that was October '71.

Q. I see. Income or as the result of that investigation an order was entered by the Michigan Department of Commerce, was there not?

A. I think there was. I guess I got a copy of it; I am not sure.

Q. And that order was issued on October 22, 1971, is that right?

A. That is the date is shows there, yes.

Q. All right.

A. I think the date we got is was in December.

Q. Now, in connection with this investigation you were being investigated by the Securities Bureau of the Michigan Department of Commerce?

A. They said so. Nobody was ever around to talk to me or anything.

Q. And have you, did you read that order when you received a copy of it, Mr. Orr?

A. Yes, I even called them about it. I went to see them.

Q. And didn't they indicate to you that you had done certain things in connection with the Securities Law that was not right; that was unlawful?

A. They claimed solicitation of a group to buy real estate with a security. Our attorney advised us differently and he advised us to go to the President of the company and I myself made a date, went into the State Department and told them so and told them it happened quite a few months before that.

THE COURT: If we can, let's keep our answers responsive so that it will permit an objection if there be one and the Court can rule and we can proceed a lot more quickly.

Q. (By Mr. DesJardins): Isn't it true, did they in their investigation disclose that you and J.M.H. Development Corporation in May of 1971 in the Grand Rapids Press and in April and May of 1972 in the Muskegon Chronicle offered for sale in Michigan 5,000 units in an option contract which J.M.H. Corporation had to purchase of certain land and offered in the same newspaper 5 shares of Snowflake Shopping Mall of Muskegon, Inc., stock?

A. That is what they alleged.

Q. All right. As a result of that investigation they issued an order against you, did they not?

A. I think that is the order—there was an order, I think. No—yes, there was an order.

Q. And that order directed you meaning Harlan Orr and J.M.H. Development Corporation, to cease and desist in engaging in the activity that they alleged in the first page of that report. Is that not true?

A. I think it says for the sale of stock.

Q. And didn't that order further provide that you and J.M.H. Development Corporation, that the exemption to offer securities without registration under certain sections of the Uniform Security Act were withdrawn from you and J.M.H. Development Corporation; is that not correct?

A. That is what was in the order, that is correct.

Q. And didn't that order further provide—I am going to read from the order so we are clear on it. It further orders pursuant to Section 402(c) of the Act that: "For reasons set forth above the exemption in clause 10 of Section 402(b) of the Act and the exemption in clause 8 of Section 402(b) of the Act are and are hereby summarily withdrawn and revoked as to respondents with respect to the above mentioned securities and any other securities of J.M.H. Development Corporation."

A. That is true.

Q. All right. Now, did this order further provide that if you did not agree with the determination that had been made by the Department in its investigation that you had an opportunity to appeal?

A. It sure did.

Q. Did you appeal?

A. We visited them, the President of the company to tell what we had done, what the picture was and it was of no force and effect, though, we weren't offering any stock or anything.

THE COURT: The Court is going to say it is not a responsive answer, Mr. Orr.

THE WITNESS: I'm sorry.

Q. (By Mr. Des Jardins): And a result, hasn't the order remainded in full force and effect from the date of its issuance, is that not correct? It wasn't dismissed.

A. No, it wasn't dismissed.

Q. And the order remained in full force and effect.

MR. DES JARDINS: I would like to move the admission of this.

THE COURT: The Court will note Plaintiff's objection and the Court will admit Defendant's Exhibit 59 at this time.

Q. (By Mr. DesJardins): And that order, Mr. Orr, was in effect against you and the J.M.H. Development Corporation at the time that you undertook the development of the Chippewa Mall project in Owosso; is that not true?

A. Again, it was not done by J.M.H. Development Corporation and/or Harlan Orr; it was done by the realtor in each case.

Q. Mr. Orr, at the time that you picked up the proposed retraction from our law office in Owosso, I think it was early January of 1974, is that right?

A. That is correct.

Q. At the time, were you given any other written document other than the proposed retraction?

A. No.

Q. You were not furnished with any proposed release, were you, at that time?

A. No, I was not.

Q. And you were requested to contact our office after you had had a chance to look at the proposed retraction, weren't you?

A. I believe I volunteered that I would.

Q. You never did contact our office again, did you?

A. No, I didn't.

Q. Now, Mr. Orr, you never had any personal contact with any of the officers or employees or agents of the Argus Press, did you?

A. No.

Q. At any time?

A. No.

Q. Before or prior to the publication of this article or after the publication?

A. None.

Q. Did you not—but you did use the services of the newspaper prior to November 20, 1973?

A. Yes.

Q. All right. And at the time that you were developing the Chippewa Mall project, Mr. Orr, didn't you have a newspaper article published in the Owosso Argus Press?

A. There was one published.

Q. You were aware that that article was being published?

A. That an article was being published, yes.

Q. Did you prepare the article yourself?

A. No.

Q. Were your articles prepared by Mr. Goodrich?

A. I think Mr. Goodrich and Mr. Newell together.

Q. Prepared that article?

A. Yes.

Q. You knew about that?

A. I knew that one was being prepared, yes.

Q. And do you recall the date that that newspaper article was published?

A. No. It was the early part of July, I believe.

Q. Would it be correct to say that the article was published on July 9, 1973?

A. Yes.

Q. That had been identified as Plaintiff's Exhibit No. 61? Mr. Orr, I am going to show you Defendant's Proposed Exhibit 62 and ask you if that if the newspaper article that was published in the Owosso Argus Press?

MR. KOBZA: Well, we will stipulate that it was. There is no objection to that.

THE COURT: All right, the Court is going to admit Defendant's Exhibit 61.

Q. (By Mr. DesJardins): Mr. Orr, that was a newspaper article announcing the proposed development of the Chippewa Mall?

A. Yes.

Q. And it appeared on the front page of the Owosso Argus, did it not?

A. That is correct.

Q. And it was an article that was helpful to you in connection with your attempt to develop the Chippewa Mall, wasn't it?

A. Yes, yes.

Q. All right. And there were certain statements made in the article, were there not?

A. Yes.

Q. All right. Now, at the time of the article there was a sketch of the proposed mall, is there not?

A. Yes.

Q. And the same sketch that you entered into evidence here today, isn't it?

A. That is true.

TESTIMONY OF JOSEPH PEACOCK

Q. Mr. Peacock, have you ever personally met the plaintiff in this action, Harlan Orr?

A. No, I haven't.

Q. Did you have an occasion, Mr. Peacock, to become acquainted with his business associate, Merlin Goodrich?

A. I have met him, yes.

Q. All right. Approximately when was it that you met Merlin Goodrich?

A. Merlin Goodrich and a local realtor, Bruce Newell, came to the Argus Press office, I would say, four or five days before the article that appeared in the paper, July 9, with a proper news release about a land shopping mall that they were developing.

Q. Now, that is the first time that you met Mr. Goodrich?

A. Yes.

Q. And where did they come—

A. They came into the news room.

Q. All right. Did you talk to them at the time they came?

A. Yes, I talked to them in the news room.

Q. What did they request of you?

A. They presented me with a, what I would call a news release. It doesn't say "news release" on it: they presented me with the piece of paper with some sort of heading on it which I didn't pay much attention to. But, in the middle of the paper was a description of the Chippewa Mall.

Q. That was a typewritten page that they presented to you?

A. Yes.

Q. What did they ask of you?

A. They wanted to know whether or not the newspaper would be willing to print this news release.

Q. All right. And what was your answer to their request?

A. Well, my answer was yes, but that I had to look at it and fit it, make it fit journalistic style.

Q. Now, Mr. Peacock, I will show you Defendant's Exhibit 61 and ask you is that the newspaper release or all that appeared in the Owosso Argus Press as a result of the request by Mr. Goodrich and Mr. Newell when they came to see you?

A. Yes, it is.

Q. All right. Now, did they provide you with the information in that news release?

A. Yes, they did.

Q. I notice, Mr. Peacock, at the top of the article is a sketch that appeared on the front page of the Owosso Argus Press. Did they bring it with you?

A. They provided a sketch and they provided all the information that is in the article.

Q. Approximately how many days after they were in to see you was that article published?

A. I am not certain for sure; it was a matter of two or three days I would think. At the most, maybe four.

Q. All right. Now, in looking over that article, did the information that was contained in that article, was that provided to you by Mr. Goodrich and Mr. Newell when they were in conference with you?

A. Everything in this news story was provided by them, on this piece of paper, other than the lead, the first paragraph of the story. I wrote that after asking them the question of whether or not the Chippewa Mall would be a similar mall comparable to the Genesee Valley Mall in Flint. They said "Yes".

Q. All right. Mr. Peacock, if there were statements attributed to persons in this article, where did that attribution come from?

A. It came from them, from Newell and Goodrich.

Q. All right. What do you mean by "attribution"?

A. I mean if there is a statement, for example, I think it says that there were going to be thirty—

Q. I think it may be easier—would you select a particular paragraph of that particular article. Mr. Peacock and give an example of what is involved in "attribution"?

A. The third paragraph down "multi-million dollar community mall will be known as 'Chippewa Shopping Center' according to developer, J.M.H. Development Corporation." That was written on the release and—

Q. That was attributed to the corporation or a representative of the corporation?

A. I would say it was attributed to the corporation and Mr. Goodrich who was acting as the spokesman for J.M.H.

Q. Were there statements in that newspaper article that were attributed to Mr. Goodrich?

A. The third column, second paragraph: "Both Orr and Goodrich said it is planned that the mall will be owned by local citizens 100% assuring the shopping center will be home-owned rather than by outside interests."

The attribution to Orr came on that written statement, written, it is the statement "both Orr and Goodrich" and Goodrich, in my discussions with him, acknowledged that that was the truth.

TESTIMONY OF HERBERT A. HASSE

Q. Now, first of all, I am going to, Mr. Hasse, have you look at Plaintiff's Exhibit 53 and ask you if that if that is the newspaper story that you have reference to?

A. Yes, this is the one I wrote, yes.

Q. And that is the newspaper story that you prepared as a news reporter?

A. Yes.

Q. All right. Now, when did you write that story, Mr. Hasse?

A. Well, probably between the hours of 7:00 a.m. and 11:00 a.m., on November 20, 1973.

Q. All right. And at the time what information or sources of information did you utilize in the preparation of that newspaper story?

A. I have been thinking about this, too. I had some background information from Detective Runyan prior to the story breaking. Now, since I knew about the story and did cover the Court on a daily basis, it is possible that I talked to the Shiawassee Prosecutor prior to that date. If there were any Court records, it is possible that I had seen them prior to this date and on that date, if I recall, I recalled Detective Runyan at the Sheriff's Department who verified other news reports he had heard. I covered the Court to find the disposition of the preliminary arraignment. I don't have my notes. I don't know what I—I believe they were destroyed when I left the paper.

Q. You did write a draft for that newspaper article, is that right, Mr. Hasse?

A. If I recall I had quite a few notes on it since it was over a period of time. You mean a predraft?

Q. Yes, or did you have a draft of the newspaper article on that day, November 20th?

A. Of this one, no, just my notes.

Q. All right. At that time you were working in the preparation of that newspaper article, were you aware, or

did you have access to Plaintiff's Exhibit—or, Defendant's Exhibit 61 which has been introduced into evidence?

A. Yes, I had read that.

Q. You read that article? What was that article, Mr. Haase?

A. It—that was an earlier article that appeared in the Argus Press—actually, it was a different article.

Q. Concerning the Chippewa Mall?

A. Yes, the Chippewa Mall Shopping Center.

Q. All right. I am going to show Defendant's Exhibit 69 and ask whether or not you recognize that?

A. This is a copy, yes, of an AP story that we had on the same day.

Q. All right. And did you have that AP story in front of you when you wrote your newspaper article?

A. Yes.

Q. And you had read it?

A. Yes.

Q. All right. Mr. Haase, when you had your story completed, what happened to the story that you had written in the course of preparation of the newspaper article? Well, it was completed?

A. Yes.

Q. Yes, when it was completed?

A. Well, I submitted it to the managing editor.

Q. On that day who was acting as managing editor of the newspaper?

A. Joe Peacock.

Q. So, you gave the story to him to be edited, is that right?

A. Yes.

Q. Did you see the story again after that time?

A. They returned it, yes. They returned it to our desks.

Q. They returned it to your desk? All right. Was there any changes made in the substance of the newspaper article as you wrote it in the course of editing by Mr. Peacock?

A. I honestly couldn't tell you. It looked the same, but it has been a long time.

Q. It has been long ago. Does look like the article that you wrote?

A. Yes. They may have polished it some.

Q. Your newspaper article, as it was published, the newspaper article and the one that was published in the newspaper as far as you can tell are exactly the same, is that correct?

A. Yes.

Q. And the basis are the sources of information that you previously described in your testimony?

A. Yes, and also, I believe I heard the radio station, WOAP.

Q. On the same day, the 20th?

A. It would have been the 20th, yes.

Q. All right. Now, the particular morning the person being charged under that criminal indictment, was in Court appearing in the arraignment, so you verified the fact that they appeared in District Court that morning as I understand your testimony?

A. Yes.

Q. And from that you were able to secure the amount of bond and the date for which the preliminary examination had been set?

A. Yes, also the list of charges, I suppose.

Q. At the time that you wrote the article was there any question in your mind about the accuracy or about the information that went into the newspaper article?

MR. KOBZA: I object to the question. It is invading the providence of the jury.

THE COURT: Well, the Court will overrule the objection.

A. Would you ask the question again?

MR. DES JARDINS: I will rephrase the question.

Q. At the time that you wrote the article, the information that you had, did you have any reason to believe that that information,—let me withdraw the question and rephrase it. Did you have any reason to doubt the accuracy of any of the information contained in the newspaper article?

A. None.

Q. Did you have any reason to doubt any of the sources of information that you have disclosed to the jury and the Court here today concerning this information?

A. No.

Q. And went into the newspaper article?

A. No, I didn't.

TESTIMONY OF RONALD RUBACH

Q. All right, sir. And then did you conduct an investigation, that is, yourself?

A. Yes, sir. Beginning September 4 of 1973. I, Herb Runyan of the Shiawasse County Sheriff's Department and Detective Bart Park of the Michigan State Police again contacted Mrs. Walker and another subsequent investor and offeree that she had identified.

Q. How many investors did, or offerees, did Mrs. Phyllis Walker identify to you?

A. Twenty-eight or twenty-nine.

Q. Did you also indicate Newell Relaty, Bruce Newell?

A. Yes, sir.

Q. Did he inform you that he had also had some offerees or contacts?

A. Yes, sir. He identified between seven or eight but indicated that he thought there were more. He couldn't rule out that.

Q. Do I add that probably there were somewhere around thirty-seven offerees that these two gave you?

A. Yes.

EXHIBIT (38)

RECEIVED AUGUST 1, 1973
MICHIGAN DEPARTMENT
OF COMMERCE
SECURITIES BUREAU

PROPOSED
CHIPPEWA MALL SHOPPING CENTER
OWOSSO, MICHIGAN

Prepared by:
J.M.H. Development Corp.
868 2nd St.
Muskegon, Michigan

PLAN FOR
DEVELOPMENT, OWNERSHIP, & OPERATION
OF PROPOSED
CHIPPEWA MALL SHOPPING CENTER
M-21
OWOSSO-CORUNNA, MICHIGAN

26 Stores (31 on projection)
292,000 sq. ft. Enclosed Mall Shopping Center
48 acres—2500 car parking

Target for Opening: 1975-76

LETTERHEAD OF J.M.H.
DEVELOPMENT CORPORATION

Muskegon Office
Durham Building
868 2nd Street
Muskegon, Michigan 49440

This Company is primarily made up of a group of Professionals, who are associates of the Company, and as such each performs a specialized service, necessary to the accomplishment of a complete job of development (turn key job to "Owners") of a Mall Shopping Center.

i.e. associates—

Attorneys, Real Estate Broker, Economic Analyst, Real Estate Leasing, Mortgage Broker, Insurance Broker, Architects, Engineers, Contractors, Style & Design Decorator, Real Estate Appraisor, Accountant, Tax Counselor, Advertising and Operational Management.

The Development Corporation contracts with the Limited Partnership—Chippewa Mall Shopping Center, Shiawassee County, Michigan, for complete development, land acquisition, feasibility report, zoning when necessary, leasing, financing, construction and management, on a total contract fee basis.

The "Owner" entity, of Chippewa Mall Shopping Center, Shiawassee County, Michigan will be a Limited Partnership consisting of 25 units or shares at $500 per unit.

DEVELOPERS HISTORY

The Developer has been organized about three years, and was in-corporated, March 15, 1971.

No Shopping Center projects are as yet completed. Most retail stores plan their expansion program four to five years in advance. Developer has to meet their time table.

Shopping Centers in Process:

1. Muskegon, Michigan
   "Muskegon Metro Mall" . . Apple Ave.
   400,000 sq. ft.-36 stores . . Opening Scheduled: 1974-75
2. Superior, Wisconsin
   "Tower Mall" . . Tower Ave.
   230,000 sq. ft.-22 stores . . Opening Scheduled: 1974-75
3. Owosso-Corunna, Michigan
   "Chippewa Mall" . . Owosso, Michigan
   300,000 sq. ft.-26 stores . . Opening Scheduled: 1975-76
4. Battle Creek, Michigan
   M-66 Highway, Battle Creek
   350,000 sq. ft.-27 stores . . Opening Scheduled: 1976-77
5. Waukesha, Wisconsin
   Hill Side Mall. E. By Pass . . Waukesha.
   400,000 sq. ft.-32 stores . . Opening Scheduled: 1976-77

MOTEL PROJECTS IN PROCESS

6. Muskegon, Michigan . . "Hilton"
   230 room-Convention Hi-Rise . . Scheduled: Late 1975-76
7. Duluth, Minn.
   100 Room-"Economy" . . Scheduled: 1975-76
8. Virginia, Minn. . . "Ramada" 100 room
   100 over-nite camping . . Scheduled: 1975
9. Milwaukee, Wisconsin
   50 Room "Economy"
   Air Port-Mitchel Field.

CHIPPEWA LAND CORPORATION
(a proposed Michigan Corp.)
Owosso, Michigan

CAPITALIZATION:

2,500 Shares-Common Stock, par value $100 each (25 blocks of 100 shares each)

PURPOSE:

Engage in real estate investments, acquire real properties, improve and/or develop real estate generally, and to trade, to own, sell, and/or dispose of real estate investments.

ORGANIZATION-SUBSCRIBERS:

Pre-Organization-offer . . . not to exceed 10 persons
Post-Organization-offer . . . not to exceed 15 persons

1. Corporation will purchase from J.M.H. Development Corporation a total of five parcels of land on M-21 Highway, 48 acres more or less, description attached. This real estate will be zoned commercial, shopping center, cleared to ground level, with utilities available at the site.

   48 acres . . . price—$690,000
   $100,000 within 30 days
   $100,000 within 90 days
   $440,000 within 2 years.

2. Corporation will (after acquisition of the real estate) give two years purchase option to

   Chippewa Mall Shopping Center
   (a limited partnership)

at price paid by the Corporation—$690,000. No profit to Corporation (Stockholders total investment is returned to treasurer).

3. The partnership to be organized, plan to construct an enclosed Mall type shopping center, as per plot plan (at-

tached) dated April 30, 1973 by L. S. Emmert & Associates, Architects, Elkhart, Indiana.

4. Members of the partnership, may be the stockholders of the Corporation whose contribution to partnership shall be $500 for each share in the partnership.

5. Partnership shall contract with J.M.H. Development Corp., for a turn-key development of the enclosed climate controlled Mall Shopping Center. Consideration—6% fee, to be payable out of mortgage financing.

Pre-development to include:

(a) Zoning for shopping center
(b) Clearing of the land
(c) Available utilities
(d) Leasing of the stores
(e) Mortgage financing
(f) Architectural and engineering
(g) Construction
(h) Insurance
(i) Management.

6. The General Partner: (Realtor proposed) may be the manager of the operation of the Shopping Center.

7. Proforma—projection (attached)

1. Number of stores proposed
2. Rental income projected
3. Cost of turn-key development estimate
4. Operation costs, and profit projected
5. Investors cash return, and tax shelter anticipated.

NOTE: The above projections are a guide line and/or a goal to follow and are *not* guaranteed representations.

8. Pre-development cash expense projection (attached). The funds for these required cash expenses are provided to J.M.H. Development from profits on sale of the land to Chippewa Land Corporation.

CHIPPEWA MALL
Owosso, Michigan

PROJECTION

INCOME		
1 Dept. Store	60,000 sq. ft. @ $2.25	$135,000
1 Dept. Store	60,000 sq. ft. @ $2.25	135,000
1 Dept. Store	50,000 sq. ft. @ $2.60	130,000
4 Stores @ 8,000 ft.	32,000 sq. ft. @ $4.00	128,000
10 Stores @ 4,000 ft.	40,000 sq. ft. @ $4.50	180,000
8 Stores @ 1,200 ft.	9,600 sq. ft. @ $5.00	48,000
6 Stores @ 800 ft.	4,800 sq. ft. @ $6.00	28,800
	256,400 sq. ft.	$784,800
Commons 15%—	35,600 less 5% vacancy	
	292,000 allowance	39,200
		$745,600
COST		
Construction—292,000 sq. ft. @ $12.00		$3,500,000
Parking Lot—2,500 cars—26 acres. @ $5,000		130,000
Architect 6%		210,000
Mtg. Fee 2%		100,000
Land Cost		690,000
Developer fee 6%		270,000
Contingency (Interest)		100,000
		$5,000,000
Mortgage $5,000,000		
8¾%—25 yr.		
(9.87) Debt service $493,500		
OPERATION		
Debt Service—5 M—25 yr. 8¾% (Interest Only)		$427,000
Principal Payment		67,500
Taxes & Insurance		100,000
Management—Labor		20,000
Replacement—reserve		43,000
Maintenance—Labor		24,000
Cash Flow		64,100
		$745,600

CHIPPEWA MALL LIMITED PARTNERSHIP

Earnings Projection

Rent at full occupancy	$784,800	
Less 5% vacancy allowance	39,200	$745,600
Expenses: *Operation*—1st year		
Interest only—on debt service	$427,000	
Taxes & Insurance	100,000	
Management—labor	20,000	
Maintenance—labor	24,000	571,000
Taxable Income (Cash flow)		$174,600
Less Cash requirements		
(a) Mortgage principal payment	$ 67,500	
(b) Replacement reserve	43,000	110,500
Cash flow—Net		$ 64,100
Distribution available		$ 64,100
1—Share—1/25 interest (cash)		$ 2,564

Depreciation

Component "Schedule" Total annual allowance		$295,800
150% acceleration (Declining Bal.)		147,900
1st full year operation		$443,700
Less—Taxable income		174,600
Less: Cash flow—deficit		$269,100
Allocate to partners		269,100
Deduction credit—1/25 Interest		$ 10,764
Earnings assume 50% tax bracket	$ 5,382	
Cash distribution	2,564	
Net earnings on 1/25 Interest	$ 7,946	

NOTE:

The above projection is a guide line or goal to seek, and is not guaranteed representation, the result could be more or less than the projection.

SCHEDULE

Component Depreciation—	Total Cost	$5,000,000
	(Less Land)	4,300,000

	Cost Breakdown Estimate	Life Expectancy	Allowance Anually
Bldg.-shell (31%)	$1,330,000	30 yr.	$44,300
Heating & Ac (8%)	344,000	8 yr.	42,930
Ceiling-Interior (20%)	860,000	10 yr.	86,000
Lighting-parking lot (4%)	172,000	15 yr.	11,070
Fence & Signs (1%)	40,000	15 yr.	2,600
Paving-Utilities (10%)	430,000	10 yr.	43,000
Roof (4%)	172,000	15 yr.	11,500
Plumbing (10%)	430,000	15 yr.	28,600
Electrical (12%)	516,000	20 yr.	25,800
100%	$4,294,000		$295,800

PRE-DEVELOPMENT

24 Months

Advertising	10,000
Printing	5,000
Miscellaneous office expense. (24 mo.) telephone, postage, supplies etc.	8,000
Legal, leasing 24 mo.@ $1,000	24,000
Organization	10,000
Feasibility & Mortgage Application	10,000
Topo-survey-soil test	6,000
Leasing 2 men—24 mo. @ $1,000	48,000
Legal—zoning—etc.	10,000
Architect & Engineer (2 yr.)	45,000
Travel Expense—24 mo. @ $1,000	24,000
Land Clearing & Utilities	50,000
	$250,000

PARCELS OF LAND

(description)

48 acres more or less

1. Sec 21 T7N R3E. Com at NW cor of sec 21 th S on W line of said sec to W 1/4 post Th E on 1/4 line of said sec 80 rds 11 ft th N on line par'l with W line of sec 73 rds th W par'l with N line of sec 603 ft th N par'l with W sec line 15 2/100 rds th W 24 rds on a line par'l with N sec line th N par'l with W sec line to N line of sec th W 20 rds to beg, except strip of land 900 ft along N & S of sec, *22-1/2 acres more or less.*

2. City of Corunna third ward farm property com 20 rds E of NW cor of NW 1/4 th E 24 rds to NW cor of land of E bold th S par'l with W sec line about 71 rds to cen of Caledonia drain th W alg cen of SD dr abt 24 rds to land owned by Flagg th N alg Flagg's E line about 71 rds to beg sec 21 T7N R3E. *12 acres more or less.*

3. City of Corunna third ward farm property W6 acres of 20 acres com at NE cor of W 1/2 of NW 1/4 th S 87 rds W 603 ft N to sec line E to beg Sec 21 T7N R3E, *5.6 acres more or less.*

4. City of Corunna third ward farm property W 5 acres of E 14 acres of NW 1/4 of NW 1/4 sec 21 T7N R3E, *5 acres more or less.*

5. City of Corunna third ward farm property W 2/3 of foll desc ld exc E 5 rds of sd W 2/3 viz: E 7/10 of foll com at NE cor of W 1/2 of NW 1/4 of sec th S 87 rds W 5 acres thereof. Sec 21 T7N R3E, *3 acres more or less.*

Lansing, Michigan

To All To Whom These Presents Shall Come:

I, Richard H. Helmbrecht, Director of the Michigan Department of Commerce, Do Hereby Certify That Cease and Desist Orders issued under the Michigan Uniform Securities Act, 1964 PA 265, as amended, are records in the custody of the Michigan Department of Commerce, Corporation and Securities Bureau.

I hereby certify that the attached Cease and Desist Order in the matter of Harland E. Orr and JMH Development Corporation is a true and exact copy of the original.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Department, in the City of Lansing, this 5th *day of* January *19* 76

Richard H. Helmbrecht
Director

EXH. 59
MAR 8 1978
James E. Wyszynski
Official Court Reporter

Form No. 31

DEPARTMENT OF COMMERCE
LETTERHEAD

ORDER

In the matter of
HARLAN E. ORR
and
JMH DEVELOPMENT
CORPORATION
301 Liberty Life Building
Muskegon, Michigan 49440
(respondents)

TO CEASE AND DESIST
AND
REVOKING AND WITHDRAWING
CERTAIN EXEMPTIONS

INASMUCH AS an investigation made by the Securities Bureau of the Michigan Department of Commerce, pursuant to Section 407 of Act 265 of the Public Acts of 1964, as amended, disclosed that the respondents, by advertisments made during May of 1971 in the Grand Rapids Press and during April and May of 1971 in the Muskegon Chronicle, offered for sale in Michigan $5,000 units in which units have been included securities described as undivided interests in an option contract of JMH Development Corporation for purchase of land and property as well as 500 shares of Snowflake Shopping of Muskegon Inc., and

INASMUCH AS the respondents thus have been offering these securities in violation of Section 301 of the above mentioned Act in that the securities have not been and are not now registered in Michigan under the Act nor are they exempted by Section 402 of the Act from registration, in that the aforesaid $5,000 units include the above mentioned option, a form of investment contract, which disqualifies the units for the exemption stated in 402(b)(10) of Act 265 of the Public Acts of 1964, as amended, and

INASMUCH AS the aforesaid units do not qualify for the exemption stated in Section 402(b)(9) of Act 265 of the Public Acts of 1964, in that the units were offered by means of a newspaper advertisement, and

INASMUCH AS the respondents have engaged in the above practices which are acts in violation of the Act and are about to engage in acts and practices constituting violations of the Act within the meaning of Section 408, and

INASMUCH AS the Bureau finds this action necessary and appropriate and in the public interest and for the protection of investors and consistent with the purposes intended by the policies and provisions of the Act,

IT IS THEREFORE ORDERED, pursuant to Section 408 of Act 265 of the Public Acts of 1964, as amended, that the above named respondents CEASE AND DESIST from engaging in activities in violation of and without complying with the provisions of said Act, and

IT IS FURTHER ORDERED, pursuant to Section 402(c) of the Act, that for the reasons set forth above, the exemptions in Clause 10 of Section 402(b) of the Act and the exemptions in Clause 8 Section 402(b) of the Act be and are hereby SUMMARILY WITHDRAWN AND REVOKED as to the respondents with respect to the above mentioned securities and any other securities of JMH Development Corporation, and

IT IS FURTHER ORDERED, that if the respondents request a hearing within 15 days of this Order then within 15 days after receipt by the Department of such a request in writing the matter will be set down for a hearing; that if a hearing is requested or ordered and is held, the Department shall make a determination and enter a further Order; that if no hearing as specified above is requested and none is

ordered by the Department, then, unless modified or vacated by the Department, this Order will remain in effect.

MICHIGAN DEPARTMENT OF COMMERCE
Richard E. Whitmer, Director

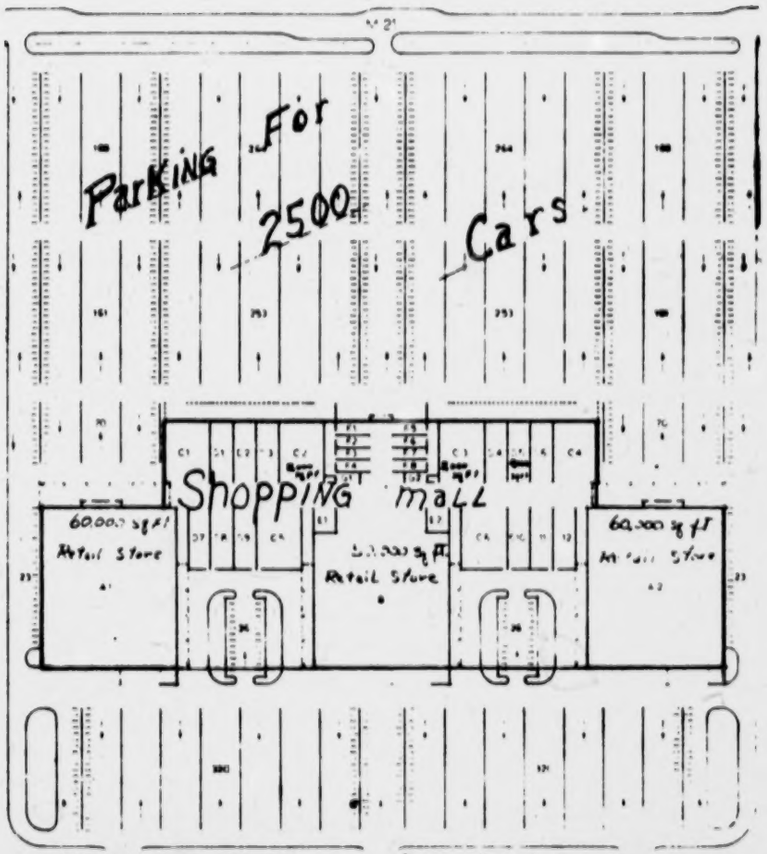
By: /s/ Eric J. Schneidewind
Examining Attorney
Securities Bureau

Dated: October 22, 1971
Lansing, Michigan

(A copy of this Order is being sent by Certified Mail to the respondents)

CHIPPEWA MALL

SHOPPING CENTER



CHIPPEWA MALL SKETCH —Preliminary sketch plans for a community shopping mall to be developed by a Muskegon firm have been released. It will contain 30 stores and is to be located on east M 21. It is scheduled to open in 1976.

30 Stores

Community Shopping Mall Planned for Shiawassee

A new, temperature controlled enclosed shopping mall, similar to the Genesee Valley Mall in Flint, is being planned for Shiawassee County.

It will be erected on east M-21, east of the Pines Restaurant, and is scheduled for opening in 1976.

The multi-million dollar community mall will be known as the "Chippewa Mall Shopping Center," according to the developer, J.M.H. Development Corp.

Harlan Orr is the president of the corporation which is headquartered in Muskegon.

The land for the proposed mall, consisting of 48 acres, with a 1,200 foot frontage on M-21, was acquired by Bruce Newell, real estate broker, located at 440 Corunna Ave.

Merlin Goodrich, who is associated with J.M.H., said the floor plan is designed to cover 300,000 square feet of store leasing area with another 40,000 square feet which will house The Commons.

The 340,000 square foot area, all under one roof, covers approximately eight acres. The floor plan was prepared by L.S. Emmert and Associates, architects, of Elkhart, Ind.

Three anchor stores will be flanked by 27 additional complimentary retail stores which will provide complete retail services, according to Goodrich. Parking will be provided for 2,500 cars.

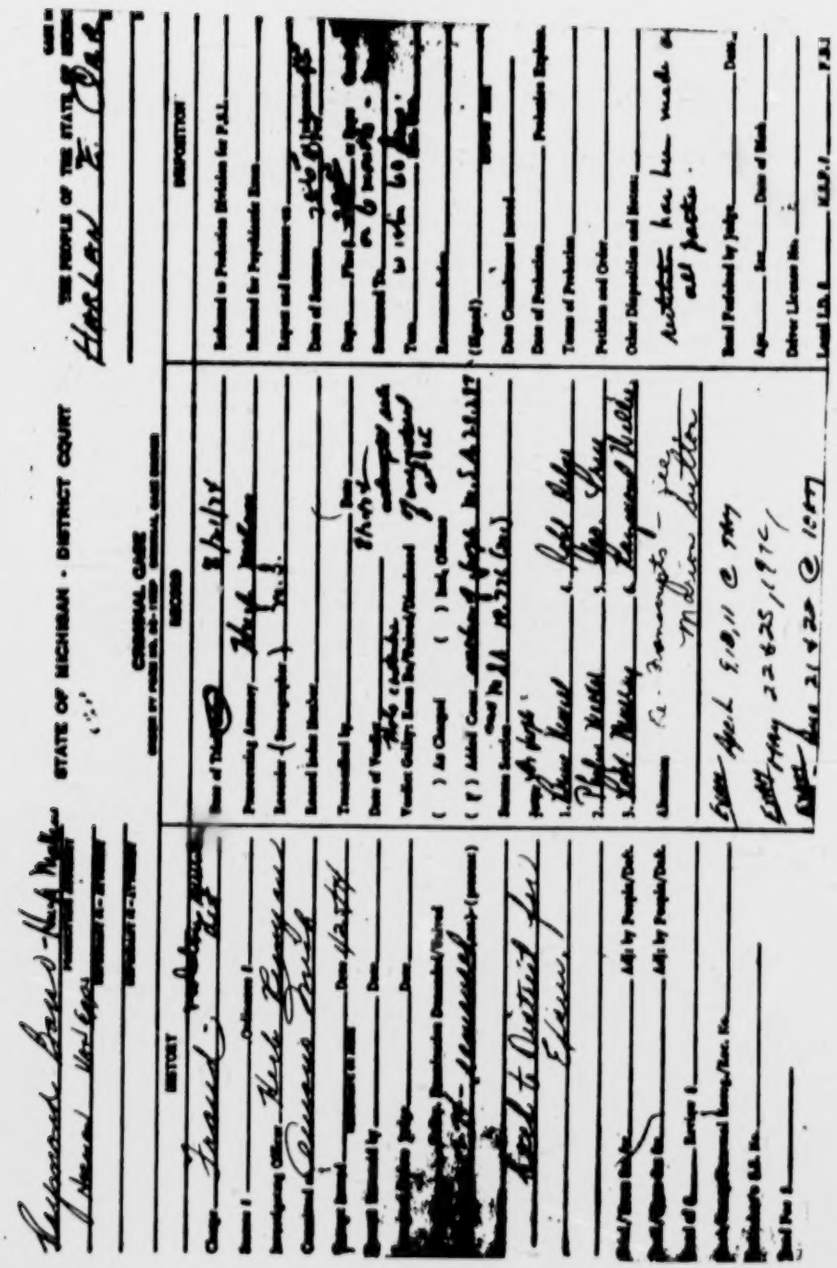
Orr said a tenant list will be announced later, but that much of the rental space has already been committed, and that all of the tenants will be newcomers to Shiawassee County.

He said Newell Real Estate will be the local contract for the pre-leasing of store space.

Both Orr and Goodrich said it is planned that the mall will be owned by local citizens 100 per cent thus assuring the shopping center will be home owned rather than by outside interests.

Goodrich is a former Owosso resident and is the son of Mr. and Mrs. Neil Goodrich of Corunna Ave.

Newell said the concept of an enclosed community mall shopping center for this area is setting a good reception from many local people and will provide the vehicle to keep many retail dollars within the Shiawassee County community.



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Mall-Fraud

OWOSSO, Mich. AP—Two Muskegon men have been taken into custody for allegedly bilking local residents of $27,500 in a fraudulent shopping mall investment scheme, the Shiawassee County prosecutor's office said.

Prosecutor Ray Basso alleged the two approached local persons last summer, asking them to become investors in the Chippewa Mall Land Co.

The prosecutor said the pair used misrepresentation in claiming the J.C. Penney Co. had signed a lease for space in the proposed 30-store mall. Penney has signed no such lease, according to Basso.

Basso said at least 10 persons and two real estate firms have given statements implicating the pair, who are being held in Shiawassee County Jail.

He added the pair would be charged with at least 15 counts of obtaining money under false pretenses as well as violation of the Michigan Uniform Security Law for allegedly selling unregistered stocks.

11-19-73 07.05pcs

Defr EXH. 69
MAR 10 1976
James E. Wyszynski
Official Court Reporter
U. S. District Court